RECENT CASES

BANKS AND BANKING—FEDERAL COURT OF APPEALS LOOKS TO FEDERAL LAW TO DEFINE "BRANCH" IN STATUTE INCORPORATING STATE LAW

After the Comptroller of the Currency had indicated his intention to approve an application for a charter to operate a new national bank which would be closely affiliated with an existing national bank,[1] plaintiff Camden Trust Company, which operated a branch bank in the same locality, sued to enjoin the Comptroller's proposed action. Camden Trust contended that since the new bank would be a branch the application fell within the scope of section 36(c) of the National Bank Act which allows the Comptroller to charter a branch only if the statutory law of the state would permit a state bank to establish a similar branch.[2] The State of New Jersey, intervening as amicus curiae, maintained that the proposed bank would be characterized as a branch were it to apply for a state charter, and would not be chartered by the state.[3] The District Court for the District of Columbia rejected these contentions and granted summary judgment for the Comptroller. The court of appeals, one judge dissenting, affirmed, holding that the new bank was an affiliate, not a branch within the meaning of section 36(c). The dissent argued that approval of the new bank would offend the substance of the statutory restrictions because the characteristics of the new bank were so similar to those of a branch. *Camden Trust Co. v. Gidney,* 301 F.2d 521 (D.C. Cir.), *cert. denied,* 369 U.S. 886 (1962).

Originally both the federal and state banking systems disfavored branching,[4] but the growth of bank holding companies[5] encouraged the proliferation of the very evils against which the prohibitions of branching were directed—centralization and absentee management.[6] Since the parent in a parent-branch relationship is financially more responsible than a parent

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[1] Approval of an application is a two-step process. After informal approval has been given, the applicant must fill out additional forms. When these are executed, the formal Charter is granted. 12 C.F.R. § 4.1 (1959). Approval is not final until the official certificate has been issued. *Cf.* National Bank v. Wayne Oakland Bank, 252 F.2d 537 (6th Cir.), *cert. denied,* 358 U.S. 830 (1958).

[2] 48 Stat. 189 (1933), as amended, 12 U.S.C. § 36(c) (1958).

[3] N.J. STAT. ANN. § 17:9A-19(B) (Supp. 1961) prohibits branching in a township where another bank has previously been established and where the parent bank does not have its principal office. See notes 31-33 *infra* and accompanying text.

[4] See LAWRENCE, BANKING CONCENTRATION IN THE UNITED STATES 233-40 (1930); OSTROLENK, ECONOMICS OF BRANCH BANKING 86-87 (1930).

[5] See Legislation Note, 48 HARV. L. REV. 659, 663-68 (1935).

[6] See Note, 66 YALE L.J. 1093, 1094-96 (1957). See generally HOGENSON, THE ECONOMICS OF GROUP BANKING 9-13 (1955).

holding company,[7] a number of states preferred the lesser evil and liberalized their branching restrictions.[8] At the same time—1925-1933—pressure increased to permit national banks to branch.[9] In 1927 Congress passed the McFadden Act which allowed national banks to branch in states which permitted branching;[10] this did not satisfy the proponents of branch banking who wanted authority for national banks to branch independently of state restrictions.[11] The National Bank Act of 1933, however, again rejected this approach in favor of maintaining the equality between the federal and state systems which had developed through years of parallel growth.[12] Section 36(c) of the act permits national banks to branch only if the state in which the bank is located would explicitly permit similar branching by a state bank.[13]

Crucial to the decision of the present case was a determination whether an affiliate falls within the category of an independent bank, which can be chartered in the complete discretion of the Comptroller,[14] or within the category of branch in section 36(c), which permits approval only if state banking laws explicitly allow such a branch.[15] In declining to call the new bank a branch, the present court pointed out that an affiliate has a separate corporate structure with all the incidents of separate incorporation, whereas a branch does not; moreover, transactions between affiliated banks are more closely regulated than transactions between parent and branch. The court also emphasized that affiliates are not included in the definition of branch in section 36(f) and that Congress has recognized a distinction between branches and affiliates in other sections of the National Bank Act—at least for purposes of regulation.[16] When the policies behind branching restrictions are considered, however, the distinction between branch and affiliate becomes less clear than the court assumed.[17] Chains

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[7] See generally LAWRENCE, *op. cit. supra* note 4, at 59-80.

[8] See Westerfield, *The Banking Act of 1933*, 41 J. POL. ECON. 721, 742 (1933); Legislation Note, *supra* note 5, at 661.

[9] See 76 CONG. REC. 1998-2026 (1933); CHAPMAN & WESTERFIELD, BRANCH BANKING 116-23 (1942).

[10] McFadden Act § 7, 44 Stat. 1228 (1927), as amended 12 U.S.C. § 36 (1958).

[11] See note 9 *supra*.

[12] See CHAPMAN & WESTERFIELD, BRANCH BANKING 118-20, 135-38 (1942); *cf.* LAWRENCE, *op. cit. supra* note 4, at 94-95.

[13] 48 Stat. 189 (1933), as amended 12 U.S.C. § 36(c) (1958).

[14] 42 Stat. 621 (1922), 12 U.S.C. § 1 (1958); REV. STAT. § 5168 (1875), as amended, 12 U.S.C. § 26 (Supp. II 1960). Courts have refrained from questioning the exercise of this discretion. *E.g.*, First Nat'l Bank v. Murray, 212 Fed. 140 (8th Cir. 1914); Community Nat'l Bank v. Gidney, 192 F. Supp. 514 (E.D. Mich. 1961).

[15] If the Comptroller approves the application of a national bank to branch in a locality where a state branch could not be established, issuance of the charter may be enjoined. *E.g.*, National Bank v. Wayne Oakland Bank, 252 F.2d 537 (6th Cir.), *cert. denied*, 358 U.S. 830 (1958).

[16] Instant case at 524.

[17] *Cf.* CHAPMAN & WESTERFIELD, *op. cit. supra* note 9, at 323-24. See generally HOGENSON, THE ECONOMICS OF GROUP BANKING 177-79 (1955).

of affiliates may centralize banking control and lead to absentee management as readily as branching.[18] In any event, the court's attempt to use the regulatory sections' distinction between branches and affiliates in interpreting the section governing entry seems unjustified. Legislative history indicates that the primary congressional concern was to preserve the equality between the federal and state banking systems.[19] If the purpose of section 36(c) is to prevent national bank expansion where state bank expansion is prohibited, then state law should be examined to determine the characterization of a proposed bank.

Before the passage of legislation authorizing national bank branching, the Supreme Court held that state law applied by state courts could prevent a national bank from branching.[20] The Court stated broadly that a national bank is subject to state laws which do not interfere with the purpose of its creation, destroy its efficiency as a federal agency, or conflict with federal law.[21] The force of that rule could only have been strengthened by the subsequent passage of a statute explicitly requiring the Comptroller to look to state law in branching cases.[22] Courts have looked to state law to define other terms in section 36[23] and to define terms in other statutes that do not refer explicitly to state law.[24] Arguments for ignoring state definitions here are not persuasive. Although use of state standards would introduce a lack of uniformity into the national banking system, section 36(c) has already injected this element. And even if application of broad state definitions of branch would impair the ability of the national banking system to stimulate competition in areas where it is stifled by state restrictions,[25] these considerations are for Congress which presumably did

[18] Compare authorities cited note 6 *supra*. The parent in the present case, for example, after two abortive attempts to branch, was willing to establish an affiliate. Brief for the State of New Jersey as Amicus Curiae, instant case, p. 8.

[19] See, *e.g.*, Willis, *The Banking Act of 1933 in Operation*, 35 COLUM. L. REV. 697, 703-04 (1935); Note, 66 YALE L.J. 1093, 1094-96 (1957).

[20] First Nat'l Bank v. Missouri, 263 U.S. 640 (1924). It is interesting to note the definition of branch proposed in that case by counsel for the United States:

> A branch bank, as . . . used . . . by the office of the Comptroller of the Currency, partakes of the nature of a primary organization . . . . It is to many intents and purposes an additional bank under the same board of directors, closely associated with the parent bank, but operating in most matters independently.

Id. at 648-49. The proposed bank in the present case fits this definition perfectly.

[21] *Id.* at 656.

[22] One lower federal court has said in a recent decision:

> [T]he apparent purpose of Congress [is] to have *exactly* the same standards —state law—apply to the establishment of national bank branches as apply to the establishment of state bank branches.

Commercial State Bank v. Gidney, 174 F. Supp. 770, 775 (D.D.C. 1959), *aff'd per curiam*, 278 F.2d 871 (D.C. Cir. 1960).

[23] First Nat'l Bank v. First Bank Stock Corp., 197 F. Supp. 417, 423 (D. Mont. 1961) (definition of state bank).

[24] *E.g.*, United States v. Cambridge Loan & Bldg. Co., 278 U.S. 55 (1928) (definition of building and loan association).

[25] See Stokes, *Public Convenience and Advantage in Applications for New Banks and Branches*, 74 BANKING L.J. 921 (1957); Note, 71 YALE L.J. 502-04, 514-16 (1962).

not find them sufficiently persuasive to overcome the policy of reference to state law. The failure of Congress to include affiliate in its definition of branch in section 36(f) might be read as excluding affiliates from the reach of section 36(c). But if the omission was intentional it can as well be argued that since in other sections of the banking statutes Congress explicitly provided for affiliates when it wished to distinguish them from branches,[26] the omission of explicit provisions in section 36 evinces an intent not to distinguish between affiliates and branches for purposes of that section. Actually the omission was probably inadvertent[27] in which case the proper approach is to look to the underlying congressional policy in section 36—the preservation of the equality of the federal and state systems.[28] Achievement of results consistent with this policy requires reference to state law for the purpose of defining branch.[29]

Even though the court in the present case failed to apply or even look to state law, the result is not necessarily inconsistent with it. New Jersey's only authority for its contention that the proposed bank would be characterized as a branch under its law[30] was a statement by the State Commissioner of Banking and Insurance that he would not charter a state bank that was to be run by the same management and under the same policies as the parent bank.[31] On the other hand, the Commissioner had previously approved an application for the establishment of an affiliate, noting however his belief that the affiliated banks would be managed independently.[32] It is difficult to determine whether the Commissioner feels bound by state law to reject applications to operate affiliates which will not be managed independently or whether the Commission rejects such applications as a matter of discretion. In an area which is committed to the discretion of a federal agency, a federal court need not defer to a state officer's discretion.[33] Therefore, the present court may have reached the correct result, but it did so without the seemingly necessary examination of state law at least to determine whether the state characterization was mandatory or discretionary. The court did examine the federal law characterization for the proposed bank, implying that the definition of branch is a matter of federal law. Since the Court of Appeals for the District of Columbia is the usual forum for appeals involving the Comptroller of the

[26] See, *e.g.*, REV. STAT. § 5211 (1875), as amended 12 U.S.C. § 161(c) (Supp. II 1960).

[27] There is no indication of congressional intent, and the definition itself cannot be said to have a substantive thrust. Section 36(f) defines branch to include "any branch bank, branch office, branch agency, additional office, or any branch place of business. . . ."

[28] See notes 12 and 19 *supra* and accompanying text.

[29] Otherwise national banks thwarted in attempts to branch can accomplish their purpose by creation of affiliates, thus evading the policy of section 36(c). See notes 17-18 *supra* and accompanying text.

[30] Instant case at 526 (dissenting opinion).

[31] Brief for the State of New Jersey as Amicus Curiae, instant case, pp. 13, 15-16.

[32] *Id.* at 17-19. The Commissioner's decision is unreported.

[33] Otherwise the determination may as well be vested in the State Commissioner, whereas Congress has entrusted the decision to the federal Comptroller.

Currency,[34] such a departure from the explicit reference to state law required by section 36(c) endangers the underlying policy of preserving the equality of the federal and state banking systems.

CENSORSHIP—Morality Commission's Action in Compiling Lists of "Obscene" Paperback Books and Threatening to Recommend Prosecution of Distributors Held Not to Infringe Constitutional Guarantee of Free Speech

The Rhode Island General Assembly by resolution[1] created the Commission to Encourage Morality in Youth, whose function was to educate the public concerning obscene publications and to investigate and recommend prosecution for violations of the state obscenity statute. The Commission without public hearing prepared lists of books that it considered objectionable for sale to minors; it sent the lists to book distributors in the state and threatened to recommend prosecution of any distributor who failed to remove listed books from his stock. After a distributor refused to handle listed paperback books, the publishers of the books sued to enjoin the Commission's action. A lower court found the resolution valid but held that the Commission's action constituted an unconstitutional prior restraint. All parties appealed to the state supreme court which reversed the lower court and held both the resolution and the Commission's action constitutional. *Bantam Books, Inc. v. Sullivan*, 176 A.2d 393 (R.I. 1961), *prob. juris. noted*, 30 U.S.L. Week 3397 (U.S. June 26, 1962) (No. 969).

Operating either independently or in conjunction with law enforcement officials, private self-appointed groups like the well-known Watch and Ward Society have played an important role in the struggle to curtail obscenity.[2] The present case, however, involves a morality commission established by the state with functions and powers falling somewhere between those of a private group and those of a public prosecutor. Novel and difficult problems are presented concerning the point at which courts must intervene to protect constitutional guarantees. While a state may prohibit the distribution of obscene books,[3] its method of censorship is

[34] Though a national bank may sue in the district in which it is located, 28 U.S.C. § 1394 (1958), the majority of cases in which there will be the greatest danger of conflict between the state and federal systems will involve protesting state banks. These banks almost invariably will have to sue in the District of Columbia. Fed. R. Civ. P. 4(d)(5). The Supreme Court will be unlikely to review these cases, since there would be no conflict among the circuits. See U.S. Sup. Ct. R. 19.

[1] R.I. Acts & Resolves, Jan. 1956, Res. No. 73, at 1102, as amended, Jan. 1959, Res. No. 95, at 880.

[2] See Paul & Schwartz, Federal Censorship 249 (1961).

[3] See Roth v. United States, 354 U.S. 476, 481-85 (1957).

subject to the limitations of the first and fourteenth amendments.[4] Two recent Supreme Court cases—*Marcus v. Search Warrant*[5] *and Kingsley Books, Inc. v. Brown*[6]—suggest that constitutionality hinges on whether the state's method provides for a formal consideration of the obscenity issue, but the Court has yet to outline the requisite degree of formality. Although these cases—and all other Supreme Court obscenity cases—involved legally binding action by a state official or agency,[7] several lower courts have invalidated mere threats of prosecution by officials.[8]

The Rhode Island Supreme Court based its decision on the publishers' failure to demonstrate a causal relationship between its injury and the Commission's threats. A necessary link in the causal chain was the independent action of the distributor whose cooperation with the Commission may have been motivated by reasons other than avoidance of prosecution.[9] However, in instances of seemingly independent intervening action, the Supreme Court has connected the initial state action with the eventual effect,[10] and the trial court in the present case found that curtailment of circulation was the "inevitable result" of the Commission's action.[11] The Commission itself perceived a causal connection between its threats and the desired result[12]—the removal of listed books from distributors' shelves. Court intervention prior to prosecution is warranted from a practical standpoint. A distributor's profit on the sale of paperback books is so small in relation to the expenses and dangers of criminal prosecution that fear of prosecution and possible public disapproval will effectively remove the books from circulation. This reasoning has supported injunctions against threats of prosecution by prosecuting officials[13] and seems equally applicable to the present case. In fact, since the danger of injury is so imminent and since the listing of the books constitutes an invidious branding, the

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[4] See, *e.g.*, Lovell v. City of Griffin, 303 U.S. 444 (1938); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931).

[5] 367 U.S. 717 (1961).

[6] 354 U.S. 436 (1957).

[7] See cases cited notes 3-6 *supra*.

[8] HMH Publishing Co. v. Garrett, 151 F. Supp. 903 (N.D. Ind. 1957); New Am. Library of World Literature v. Allen, 114 F. Supp. 823 (N.D. Ohio 1953); Bantam Books, Inc. v. Melko, 25 N.J. Super. 292, 96 A.2d 47 (Ch. 1953). Although strictly holding only that the action of the prosecutor was beyond the scope of his authority, each court also found a deprivation of liberty or property without due process of law and devoted a considerable portion of its opinion to the constitutional problem. The three opinions appear to make alternate holdings of lack of authority and violation of the due process clause. One district court has gone further by enjoining a private organization from threatening to recommend prosecution. American Mercury, Inc. v. Chase, 13 F.2d 224 (D. Mass. 1926). Threats by state officials other than threats of prosecution have been enjoined. Sunshine Book Co. v. McCaffrey, 4 App. Div. 2d 643, 168 N.Y.S.2d 268 (1957), held that a threat to revoke a license by the Commissioner of Licenses on the ground that a dealer sold indecent books constituted a prior restraint in violation of the fourteenth amendment.

[9] See instant case at 396-97.

[10] See, *e.g.*, Smith v. Allwright, 321 U.S. 649 (1944).

[11] See Brief for Petitioners, pp. 16-18 (quoting trial court opinion).

[12] See *id.* at 8-9 (quoting from Commission's Annual Report).

[13] See cases cited note 8 *supra*.

publishers might be allowed to contest the constitutionality of the Commission's action even before they suffer actual economic injury. In *Joint Anti-Fascist Refugee Comm. v. McGrath*[14]—a case testing the power of the Attorney General to list organizations as subversive without notice and hearing—the Supreme Court held that the absence of prior tangible injury did not bar a suit when a high probability of injury was compounded with invidious branding; three members of the majority held that notice and hearing were a constitutional prerequisite to listing.[15] Though the listing in the present case may be less injurious than the branding in *Joint Anti-Fascist*, it is also true that the government's interest in curbing subversion is more substantial than the state's interest in eliminating obscenity. Therefore, on balance, there appears to be no justification for a more rigid injury requirement in the present situation. And, since in any event the publishers in the present case did suffer a tangible injury—loss of profits from the sale of banned books—, there seems to be no basis for the state supreme court's rejection of the trial court's finding of a causal connection between the threats and the injury.

The critical issue, then, should have been whether the Commission's procedure provides adequate safeguards. A state may not inhibit the circulation of non-obscene literature;[16] therefore, suppression of literary material must be based on an adequate determination of obscenity.[17] In the present case the Commission purported to make such a determination by its preparation of lists, but that method suffers from two possible constitutional defects. The Supreme Court has never sanctioned censorship by commissions; indeed in *Marcus v. Search Warrant*[18]—in which the Court invalidated a method of non-judicial censorship—, the Court adverted to the absence of a judicial determination as a relevant factor in distinguishing *Kingsley Books* in which a judicial method of censorship was upheld.[19] Both opinions also emphasized the importance of notice and hearing in an obscenity proceeding without, however, making such safeguards determinative. The fourteenth amendment seems to require notice and hearing for a determination of obscenity[20] since the interest threatened —freedom of communication—is protected by a constitutional guarantee that enjoys a "preferred position."[21] While the interest of the state in

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[14] 341 U.S. 123 (1951).

[15] See concurring opinions of Black, J., *id.* at 142, Frankfurter, J., *id.* at 149, and Douglas, J., *id.* at 174. Justice Jackson, also concurring, stated that a hearing was required at some stage of the procedure though not necessarily prior to the listing. *Id.* at 183. Justice Burton, the fifth member of the majority, would have disposed of the case on procedural grounds without reaching the constitutional issue. *Id.* at 124.

[16] See, *e.g.*, Lovell v. City of Griffin, 303 U.S. 444 (1938); Grosjean v. American Press Co., 297 U.S. 233 (1936).

[17] See, *e.g.*, Roth v. United States, 354 U.S. 476, 488-89 (1957).

[18] 367 U.S. 717 (1961).

[19] *Id.* at 734-38.

[20] See Roth v. United States, 354 U.S. 476 (1957) (dictum).

[21] See, *e.g.*, Saia v. New York, 334 U.S. 558, 562 (1948); Marsh v. Alabama, 326 U.S. 501, 509 (1946).

shielding minors from obscene literature is also significant, the censorship in the present case restricted adult reading as well.[22] Therefore, if commission censorship is to be approved at all, the requirement of notice and hearing with an opportunity for judicial review should be the minimum protection accorded the fundamental freedom of communication. By requiring a strict cause-and-effect relationship between censorship and financial injury, the present case permits a state to do by indirection what it may not do directly; the very effectiveness of the methods employed leads to the conclusion that the absence of appropriate safeguards rendered the Commission's action inimical to the first and fourteenth amendments.

LIMITATION OF ACTIONS—District Court Declines To Apply State Statute of Limitations to Action Under Section 303 of the Labor Management Relations Act

In an action for damages brought under section 303 of the federal Labor Management Relations Act,[1] defendant unions contended that a three-year California statute of limitations[2] barred plaintiff employers' claim. Section 303 did not include a period of limitation. The district court declined to apply the state statute to bar the federal right, and held that, until Congress should determine a cutting-off point for stale claims, there was no effective time limit except for the equitable doctrine of laches to exclude plaintiffs guilty of unconscionable delay. *Fischbach & Moore, Inc. v. International Union of Operating Eng'rs,* 198 F. Supp. 911 (S.D. Cal. 1961).

The Supreme Court has consistently held that when Congress has failed to provide a limitations period, the Rules of Decision Act[3] should govern, and federal courts should apply appropriate state statutes of limitations in federal question cases as well as in diversity cases.[4] To this settled principle there have been recognized exceptions for cases in which the

[22] In such a case the argument that the method of censorship was intended to protect minors will not suffice to avoid its invalidation on constitutional grounds. See Butler v. Michigan, 352 U.S. 380 (1957).

[1] 61 Stat. 158 (1947), 29 U.S.C. § 187(b) (1958): "Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States . . . ."

[2] Cal. Civ. Proc. Code § 338.

[3] 28 U.S.C. § 1652 (1958): "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

[4] *E.g.,* Cope v. Anderson, 331 U.S. 461, 463 (1947); McClaine v. Rankin, 197 U.S. 154, 158 (1905); Campbell v. Haverhill, 155 U.S. 610 (1895); Blume & George, *Limitations and the Federal Courts,* 49 Mich. L. Rev. 937, 941, 964 (1951); see Note, *Federal Statutes Without Limitations Provisions,* 53 Colum. L. Rev. 68, 74-75 (1953); Note, *Disparities in Time Limitations on Federal Causes of Action,* 49 Yale L.J. 738 (1940).

application of a state limitations period would be inconsistent with the purposes of the federal legislation,[5] would discriminate against federal rights,[6] or would deprive claimants of a reasonable period within which to prosecute their claims.[7] The use of state statutes of limitations to bar federally created rights has been criticized,[8] but only once, in *McAllister v. Magnolia Petroleum Co.*,[9] has the Supreme Court declined to use a state period of limitation. In that case the Court held that an unseaworthiness claim joined with an action brought under the Jones Act was so intertwined with the latter action that a shorter time limit could not be applied to the unseaworthiness claim. However, the reasoning in that case seems to be limited to the peculiar configuration of the maritime remedies.[10] *Textile Workers v. Lincoln Mills*,[11] dealing with the question of the law to be applied to actions under section 301 of the Labor Management Relations Act, held that the necessity for uniform regulation of labor-management relations required the federal courts to create a body of federal substantive law. An appellate decision subsequent to *Lincoln Mills* applied a state limitations period to an action arising under section 303 of the Labor Management Relations Act,[12] thus interpreting the *Lincoln Mills* mandate as being limited to substantive law.

The district court in the present case sought to apply the *Lincoln Mills* doctrine requiring the creation of federal substantive labor law in order to foster uniformity.[13] However, the rationale which led the Supreme Court to seek substantive uniformity does not extend to the present situation.[14] The alternative in *Lincoln Mills* was to spawn confusion by allowing each state to devise its own definitions of federal labor standards. An employer or union operating in many states might suffer a substantial penalty for doing interstate business—the activity that Congress is seeking

[5] *Cf.* Hills & Co. v. Hoover, 220 U.S. 329 (1911).

[6] Davis v. Rockton & Rion R.R., 65 F. Supp. 67 (W.D.S.C.), *aff'd*, 159 F.2d 291 (4th Cir. 1946); Pufahl v. Estate of Parkes, 299 U.S. 217 (1936) (dictum); Campbell v. Haverhill, 155 U.S. 610 (1895) (dictum).

[7] *Ibid.*

[8] See, *e.g.*, McAllister v. Magnolia Petroleum Co., 357 U.S. 221, 227 (1958) (Brennan, J., concurring); Blume & George, *supra* note 4, at 992-93; 53 COLUM. L. REV. 68 (1953); 49 YALE L.J. 738 (1940).

[9] 357 U.S. 221 (1958).

[10] Jones Act claims must be joined with unseaworthiness actions if the seaman is to prosecute both. Otherwise a recovery based on one of the rights bars prosecution of the other. Baltimore S.S. Co. v. Phillips, 274 U.S. 316 (1927).

[11] 353 U.S. 448 (1957).

[12] United Mine Workers v. Meadow Creek Coal Co., 263 F.2d 52 (6th Cir.), *cert. denied*, 359 U.S. 1013 (1959). The court in the present case attempted to distinguish that decision by saying, "the issue was *which of two* possible state statutes should be applied, the question of the proper applicability of *any* state statute apparently not being raised." Instant case at 913. The sixth circuit, by applying a state statute of limitations, must have considered the latter question so settled as not to require discussion.

[13] Instant case at 913.

[14] The argument that uniformity in substantive regulation requires a uniform limitations period can be made in any case involving a federal statute without limitation. This argument, however, has been rejected in every area of private litigation in which it has been made. See cases cited note 4 *supra*.

to protect—by having to conform his actions to many differing substantive rules. On the other hand, uniformity in substantive regulation makes variousness in limitations periods less burdensome. Predictability of limitation is desirable only so that the prospective defendant will know how long to provide for the contingency of litigation.[15] Even if the prospective defendant operates in several states with differing limitations periods, he need only anticipate litigation until the longest statute has run, and generally there will be relatively little disparity between the longest and the shortest. A uniform limitations period, then, benefits prospective defendants only if the uniform period is shorter than any of the applicable state statutes.[16] And predictability only allows prospective plaintiffs' lawyers to procrastinate for a predictable period of time; it is of no benefit to prospective plaintiffs themselves. A lack of predictability imposes the slight additional burden of forcing attorneys to file complaints promptly after the cause of action has been discovered. Thus predictability deriving from a uniform federal limitations rule would only slightly advance the interests of the parties. Uniformity would also reduce forum shopping, but this could be accomplished by a uniform federal rule for choice of the applicable state statute of limitations.[17] Furthermore, not only is the policy of uniformity articulated in *Lincoln Mills* inapplicable to the present situation, but the remedy for lack of uniformity proposed by the district court actually leads to increased uncertainty since the application of laches varies from case to case.

In practice, much of the uncertainty surrounding the application of state statutes of limitations is produced by the federal courts themselves. Some courts have interpreted "the appropriate state limitations statute" to mean the limitations statutes of the state in which they sit as in a diversity case.[18] Others apply the limitations statutes of the state in which the federal cause of action arose.[19] The use of state "borrowing statutes" has brought further confusion.[20] Forum shopping by plaintiffs [21] in order to gain the benefit of a longer limitation period could be eliminated by the adoption of a rule that the statute of limitations of the state having the most substantial connection with the transaction should be applied.[22] Plaintiffs

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[15] For example, by maintaining litigation reserves or keeping relevant files.

[16] Plaintiffs, of course, would tend to institute suit in the forum which would apply the longest statute of limitations. However, even when it is clear which state's statute will be applied, there may be uncertainty as to which of that state's statutes of limitations is applicable. See, *e.g.*, United Mine Workers v. Meadow Creek Coal Co., 263 F.2d 52 (6th Cir.), *cert. denied*, 359 U.S. 1013 (1959).

[17] See notes 18-22 *infra* and accompanying text.

[18] See, *e.g.*, Bright v. Hobbs, 56 F. Supp. 723, 725 (D. Md. 1944); Williamson v. Columbia Gas & Elec. Corp., 27 F. Supp. 198, 203 (D. Del.), *aff'd*, 110 F.2d 15 (3d Cir. 1939).

[19] Cope v. Anderson, 331 U.S. 461 (1947).

[20] See, *e.g.*, Seaboard Terminals Corp. v. Standard Oil Co., 24 F. Supp. 1018 (S.D.N.Y. 1938).

[21] See McAllister v. Magnolia Petroleum Co., 357 U.S. 221, 229-30 (1958) (Brennan, J. concurring); 49 YALE L.J. 738, 740 (1940).

[22] For a general discussion of methods of choice of law in other substantive areas, see Cavers, *A Critique of the Choice of Law Problem*, 47 HARV. L. REV. 173 (1933).

would be bound to prosecute their claims within limits provided by the statute of the state most closely connected with the facts of the case, and would be prevented from seeking to avail themselves of the statute of a forum which had no such connection. If federal courts adhere to the policy of applying state statutes of limitations, they should attempt to define that policy so that the same federal cause of action, regardless of the forum in which it is brought, will be subject to the same limitation—that of the state having the most substantial connection with the operative facts of the case. Although this approach would require a difficult characterization of the federal claim in order to determine the appropriate state limitations statute,[23] it would eliminate much of the lack of uniformity that has been associated with the application of state statutes to a federal claim.

Lincoln Mills should not be considered authority for overruling a solid line of precedents extending back 67 years that seem to compel application of state statutes of limitations.[24] The departure from precedent in the present case is unwarranted since the very reasoning which the district court advances to support its new solution betrays the superiority of the traditional approach. State statutes of limitations should govern federal labor claims until Congress creates a federal limitations period.[25]

RATE REGULATION—ICC CANCELLATION OF RAILROAD RATES COMPETITIVE WITH WATER CARRIER RATES HELD INCONSISTENT WITH CONGRESSIONAL POLICY EXPRESSED IN SECTION 5 OF THE TRANSPORTATION ACT OF 1958.

Two water carriers offering specialized "fishy-back" service[1] in competition with railroads fixed rates five to ten per cent below corresponding railroad boxcar rates. To meet this competition the railroads reduced

[23] *Cf.* United Mine Workers v. Meadow Creek Coal Co., 263 F.2d 52 (6th Cir.), *cert. denied*, 359 U.S. 1013 (1959).

[24] See note 4 *supra*. Once before a federal court construed a Supreme Court predilection for uniformity in a narrow context—Clearfield Trust Co. v. United States, 318 U.S. 363 (1943)—as implicitly overruling the cases applying the Rules of Decision Act. City of Grand Rapids v. McCurdy, 136 F.2d 615 (6th Cir. 1943). Shortly thereafter the Supreme Court reaffirmed the traditional procedure. Cope v. Anderson, 331 U.S. 461 (1947).

[25] Section 4 of the Clayton Act, granting the right to private antitrust suits, is very similar to section 303b. Congress took forty years to provide a limitations period for this section; during this time the courts were content to apply state statutes of limitations. *E.g.*, Suckow Borax Mines Consol. Inc. v. Borax Consol. Ltd., 185 F.2d 196 (9th Cir. 1950). The plaintiff in the instant case urged the court to analogize to the limitation of this federal statute rather than to a state staute. Instant case at 912. The district court rejected this suggestion on the ground that it would be an inappropriate exercise of judicial power. *Id.* at 915. In any event, absent some pressing need, creation of limitations periods is a legislative rather than a judicial function.

[1] Sea-Land Service, Inc. transported demounted truck trailer bodies while Seatrain Lines, Inc. carried railroad freight cars.

selected trailer-on-flatcar (TOFC) [2] rates to parity with the fishy-back rates. The water carriers then challenged the railroad rates before the ICC which was already considering the reduced fishy-back rates. After extensive hearings the ICC ordered the railroads to maintain their rates at a level six per cent above the water rates, concluding that the railroad attempt to eliminate the water carrier differential constituted a form of destructive competition.[3] A three-judge district court, reviewing the ICC action, held that the ICC had not made sufficient findings to support its conclusion and that the Commission's interpretation of destructive competition was broader than Congress intended. Enforcement of the ICC order was enjoined. *New York, N.H. & H.R.R. v. United States*, 199 F. Supp. 635 (D. Conn. 1961), *appeal docketed*, 30 U.S.L. WEEK 3364 (U.S. May 16, 1962) (No. 979).

The ICC has the power to regulate intermodal competition by setting minimum rates.[4] The Commission's exercise of this power, however, is limited by the policies articulated by Congress in the National Transportation Policy [5] and in the various regulatory statutes.[6] These policies include the preservation of the inherent advantages of every mode of transportation, maintenance of economically sound carriers at a reasonable cost to the public, provision for the long term interests of national defense and commerce, and prevention of discrimination and destructive competition. Prior to 1958 the ICC's policy had been to protect all modes of transportation from reduction of traffic by requiring that rates be set high enough to allow each mode of carriage to attract its "fair share" of the traffic.[7] In pursuing this policy the Commission inconsistently applied the congressional guidelines;[8] in each case it generally chose the criterion that would allow it to effectuate its policy of dividing the transportation market according to its "fair share" standard.[9] Only in one case—*New Automobiles in Interstate Commerce* [10]—did the Commission deviate significantly from this policy; in another—*Schaffer Transp. Co. v. United States* [11]—the Supreme Court intervened to lay down the rule that protection from diversion of traffic is not appropriate when the ICC has not eliminated the possibility that the diverting carrier might have an inherent

[2] Commonly known as "piggy-back." Either one truck trailer is carried on an ordinary flatcar, or two trailers are transported on specially constructed cars.

[3] Commodities—Pan-Atlantic S.S. Corp., 313 I.C.C. 23 (1960).

[4] *E.g.*, 41 Stat. 484 (1920), as amended, 49 U.S.C. § 15(1) (1958).

[5] 54 Stat. 899 (1940), 49 U.S.C. Preamble (1958).

[6] *E.g.*, 54 Stat. 939 (1940), 49 U.S.C. § 907(h) (1958).

[7] See FULDA, COMPETITION IN THE REGULATED INDUSTRIES: TRANSPORTATION 353-60 (1961); NELSON, RAILROAD TRANSPORTATION AND PUBLIC POLICY 432 (1959).

[8] See H.R. REP. No. 1922, 85th Cong., 2d Sess. 14 (1958); S. REP. No. 1647, 85th Cong., 2d Sess. 18 (1958).

[9] See generally FULDA, *op. cit. supra* note 7, at 339-70.

[10] 259 I.C.C. 475 (1945).

[11] 355 U.S. 83 (1957) (case involved entry rather than rates).

advantage. Continued criticism of the ICC's paternalistic approach[12] led Congress in its 1958 amendment to the Interstate Commerce Act to attempt to restate the policy that should govern competitive rate regulation:

> In a proceeding involving competition between carriers in different modes of transportation . . . the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy . . . .[13]

Congressional deliberations on this amendment disclose disapproval of the ICC's inconsistent protectionist policy and endorsement of the approach articulated in *New Automobiles* and *Schaffer*.[14] The impetus then of the 1958 amendment is toward freer competition; the ICC may protect the traffic of competing carriers only if it can find justification for such action in the National Transportation Policy. In practice, such justification is likely to be found only when the rate reductions are injurious to the proposing carrier or to a competitor with an inherent advantage or when the reductions are part of a predatory campaign.[15]

The ICC finding that fishy-back was a lower cost service than trailer-on-flatcar was admittedly not enough to fit its determination within the inherent advantage exception of the 1958 amendment's stricture against holding up rates to protect the traffic of another mode of transportation. The Commission instead relied on another mandate of the National Transportation Policy—the prohibition of destructive competition. The railroad reductions, it said, would inaugurate a spiral of rate reductions which would result in the same rate differentials being established at a lower level.[16] The only effect would be to reduce the revenues of both the railroads and the water carriers. This prediction may have been accurate; there was testimony before the ICC that if the railroad reduction were approved, the water carriers were ready to lower their rates to reestablish the differential.[17] The railroads, however, were not necessarily the "aggressors" in the rate war; the water carriers took the first step in establishing a differential below railroad rates. Therefore, in relying on the

[12] See generally PRESIDENTIAL ADVISORY COMM. ON TRANSP. POLICY AND ORGANIZATION, REPORT ON FED. TRANSP. POLICY (1955).

[13] 72 Stat. 572, 49 U.S.C. § 15(a)(3) (1958).

[14] See H.R. REP. No. 1922, 85th Cong., 2d Sess. 14 (1958); S. REP. No. 1647, 85th Cong., 2d Sess. 18-19 (1958).

[15] It is difficult to make rational findings concerning such National Transportation Policy criteria as preservation of a transportation system sufficient to meet the needs of national commerce and defense.

[16] Commodities—Pan-Atlantic S.S. Corp., 313 I.C.C. 23, 41 (1960).

[17] *Ibid.*

destructive competition prohibition of the National Transportation Policy, the Commission should have either eliminated or found justification for the fishy-back differential, as the dissent by Commissioner Freas suggested.[18] Under the 1958 amendment the Commission could hold up railroad rates to protect water carriage only if it found an inherent water carrier advantage. To find an inherent advantage the ICC would have had to make cost comparisons of the overall rate structures of the competing modes of transportation.[19] This it failed to do;[20] indeed, the Commission suggested that in a comparison of boxcar and fishy-back services the railroads appeared to be the lower cost mode.[21] In any event, it was hardly legitimate for the Commission to approve the water carrier differential without finding an inherent advantage, and then to maintain the differential by characterizing railroad attempts to reestablish parity as destructive competition.

The ICC's solicitude for the water carrier differential actually stemmed from its belief that the fishy-back service could not attract traffic without it.[22] The district court, however, attacked the Commission's equation of destructive competition with competitively compelled abandonment of service.[23] It reasoned that Congress could not have been so naive as to endorse competition as a modus operandi in the transportation industry without implicitly accepting a natural result of successful competition—the elimination of the inefficient. Having failed to characterize the initial water carrier reduced rates as the first step in a spiral of rate reduction, the Commission could not so label the subsequent differential-eliminating reduction of the railroads.

While the district court decision was thus grounded in part on the conclusion that the ICC had failed to make requisite cost comparisons, the court went on to criticize the Commission's methods of cost determination, particularly the cost analyses applied to railroads in conjunction with "value-of-service" pricing.[24] Carriers are required to carry certain commodities—principally agricultural products and human beings—at rates which often fall below out-of-pocket costs.[25] To counterbalance these deficits the carriers have been allowed to surcharge the movements of certain high priced commodities.[26] This pricing structure has had several

[18] Commissioner Freas exposed what may have been the *sub rosa* motivation of the majority—the feeling that water carriers are entitled, almost prima facie without proof of cost advantage, to a rate differential. This feeling stems from a long history of water carrier differentials on break-bulk service and railroad attempts to reduce their rates in the face of established water carrier advantages. *Id.* at 52.

[19] Instant case at 644-45.

[20] *Ibid.*

[21] Commodities—Pan American S.S. Corp., 313 I.C.C. 23, 44 (1960).

[22] *Id.* at 44-45.

[23] Instant case at 641.

[24] Instant case at 643-44. For further elaboration on the mechanics of ICC cost evaluation see the appendices to the instant case and to the ICC decision, Commodities —Pan-Atlantic S.S. Corp., 313 I.C.C. 23, 54 (1960).

[25] See instant case at 643; NELSON, *op. cit. supra* note 7, at 331.

[26] See instant case at 643; Price, *Railroads and Government Policy—A Legally Oriented Study of an Economic Crisis*, 48 VA. L. REV. 196, 245 (1962).

debilitatory effects on the transportation industry,[27] but its relevance to the instant case is confined to its effect on the ICC cost evaluation process. The district court charged that the ICC allowed value-of-service considerations to influence two stages of its cost analysis.[28] First, the ICC attributes a fixed percentage of railroad overhead to out-of-pocket costs. But the contribution to overhead of the deficit-creating commodities must often be prorated among the profit making services. Thus the out-of-pocket costs attributed to these latter services include costs which are unrelated to the actual expenses of moving the traffic. Value-of-service principles also effect the ICC's calculation of "fully-distributed costs," a figure arrived at by prorating all railroad expenses—including those incurred by deficit producing services—among the profit making services.[29] However desirable it may be to recoup passenger and agricultural deficits through higher profits on the movement of high value commodities, carriers should not be subjected to a competitive disadvantage by the inflation of the "cost" of a profitable service for rate-making purposes. The original deficits will father additional losses if fictitious cost determinations prevent the carrier from competing to retain or augment its profitable carriage.

The district court thus struck two blows for competition in the transportation industry by narrowing the scope of the destructive competition exception to the congressional policy of competition enunciated in the 1958 amendment and by criticizing the use in cost comparisons of expenses unrelated to the service on which a carrier wished to lower rates.

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[27] The carriers price themselves out of the profitable markets because it becomes more economical for the large shippers to develop their own fleet of private carriers. The small shippers who cannot employ private carriage are forced to pay the high common carrier rates, thus handicapping their efforts to compete effectively with the large shippers. See *Hearings on Monopoly Problems in Regulated Industries Before the Antitrust Subcommittee of the House Judiciary Committee*, 84th Cong., 2d Sess., pt. 1, v. 1, at 90-91 (1957) (testimony of Professor Louis B. Schwartz).

[28] The court also suggested that the ICC considered deviation from value-of-service pricing to be a form of destructive competition. Instant case at 643.

[29] Instant case at 647-48.